

Settlement Begins Historic Reformation of Public Defense in New York State

October 21, 2014 — The New York Civil Liberties Union and the law firm of Schulte Roth & Zabel LLP today announced a historic settlement that overhauls public defense in five counties and lays the foundation for statewide reform of New York’s broken public defense system. By entering into the agreement, the state is taking responsibility for providing public defense for the first time in the more than 50 years since the Supreme Court held that it is a state obligation.

“Today’s agreement is a victory for equal justice more than 50 years in the making,” said New York Civil Liberties Union Executive Director Donna Lieberman. “For the first time, New York State is acknowledging its constitutional responsibility to provide lawyers to poor defendants who have been forced to navigate the criminal justice system undefended and alone. With New York’s public defense system in the national spotlight, the state has entered this agreement and shown it will no longer stand by while innocent people lose their families, homes and jobs because they’re too poor to hire private lawyers. More than 50 years after the Supreme Court called the right to public defense an ‘obvious truth,’ today our state begins making it an ‘actual truth.’”

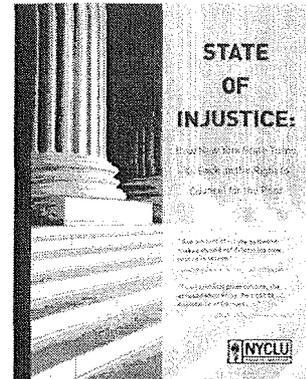
“For far too long and for far too many New Yorkers, the constitutional right to counsel has been an empty promise. With today’s settlement, the State of New York finally commits to turn that right into a reality,” said former federal prosecutor Gary Stein, the Schulte Roth & Zabel litigation partner in charge of the firm’s pro bono effort in the case. “Poor people will no longer have to stand before a court without a lawyer while critical decisions are made affecting their lives and liberty. Public defenders will now be given the time and the tools they so desperately need. This is an enormous victory not just for our tens of thousands of clients, but for all who care about fair and evenhanded criminal justice.”

The settlement agreement was reached the day before the NYCLU and Schulte Roth & Zabel’s lawsuit, *Hurrell-Harring v. New York*, was set to begin trial after seven years of litigation. The lawsuit charged that New York State’s decision to abdicate responsibility for public defense to its counties resulted in a patchwork of often understaffed, poorly resourced and largely dysfunctional public defense systems where defendants were routinely arraigned without attorneys, urged to take plea bargains regardless of the facts of their cases, burdened by excessively high bail, and incarcerated for shockingly long periods for misdemeanors and petty crimes. The suit contended that by failing to provide poor defendants with adequate representation, New York State was violating the U.S. Constitution, the state constitution and the laws of New York.

Under the agreement, the state will adopt major reforms focusing on five New York counties – Ontario, Onondaga (Syracuse), Schuyler, Suffolk and Washington – that were chosen because their public defense systems are all different and cover communities large and small, but are all emblems of New York’s flawed approach. The agreement, which will last 7½ years and is subject to court approval, contains the following major provisions:

- Ensures that every poor criminal defendant will have a lawyer at the first court appearance, where bail often is set and pleas taken;

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OUTLINE OF SETTLEMENT IN CLASS ACTION PUBLIC DEFENSE CASE: *HURRELL-HARRING vs. STATE OF NEW YORK*

Background

This class action lawsuit addressed New York State's failure to create and support a public defense system that ensures poor criminal defendants receive meaningful and effective assistance of counsel, which the state is required to provide to defendants who cannot afford to hire a lawyer on their own. The NYCLU and the law firm Schulte Roth & Zabel LLP filed the lawsuit in 2007 on behalf of poor criminal defendants in five counties, including Onondaga County, who were represented by public defense attorneys. The lawsuit argued that New York's failure to provide adequate funding, resources and oversight to the public defense system deprived those defendants of their constitutional right to meaningful and effective assistance of counsel.

On October 21, 2014 the NYCLU announced a historic settlement of the *Hurrell-Harring v. New York* lawsuit. Under the agreement, the state will adopt major reforms that will change how public defense representation works in Syracuse and across Onondaga County, and will require the state to report on progress in improving representation for the next seven and one-half years. New York State's Office of Indigent Legal Services (ILS) will create reform plans to improve public defense in Onondaga, and the state will provide additional funding to implement those plans.

There are four major components to the settlement in *Hurrell-Harring*: guaranteeing counsel at arraignment, reducing attorney caseloads, improving quality of representation and reforming eligibility standards for public defense.

1. Legal Counsel at Arraignment

The settlement will ensure that every poor criminal defendant in each of the five counties will have a lawyer at arraignment, which is the first court appearance where bail is determined and pleas may be taken. ILS will generate a plan to accomplish this in each county. New York State has allocated \$1 million to begin implementing ILS plans for the first year and is required to allocate additional state funds as needed for future years.

2. Evaluation and Limitation of Attorney Caseloads

The settlement will ensure that attorneys' caseloads give them enough time and resources to provide an adequate legal defense for indigent defendants in each of the five counties. ILS will evaluate and set caseload standards in each county for attorneys who provide indigent defense services, taking into account the fact that many such attorneys have both public and private caseloads, and that individual lawyers who take on public defense cases have access to different support resources than those who work in a public defender office or a legal aid society. Attorneys who have regular access to investigators and support staff may be allowed a higher caseload than attorneys who operate without these resources. This year, New York State allocated \$500,000 to begin tracking attorneys' caseloads, and, once ILS creates standards, the state must allocate whatever funds are needed to bring caseloads in line with those standards.



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**New York State Office of Indigent Legal Services
Hearing on Eligibility for Assignment of Counsel
Testimony of Barrie Gewanter, Director of the Central New York Chapter
of the New York Civil Liberties Union**

August 26, 2015

The New York Civil Liberties Union (“NYCLU”) respectfully submits the following testimony regarding the necessity of statewide standards for determining who is eligible for public defense services in criminal cases. The NYCLU, the New York State affiliate of the American Civil Liberties Union, is a not-for-profit, nonpartisan organization with eight offices across the state and nearly 50,000 members. I am the Director of the NYCLU’s Central New York Chapter. My office is here in Syracuse, but I respond to civil liberties concerns in a multicounty area in this region.

Throughout the state, and here in Central New York, the NYCLU works to ensure fairness in the criminal justice system, end mass incarceration, and prevent punishment of people because they are poor. We are counsel to the class of criminal defendants who are eligible for public defense services in five counties— Ontario, Schuyler, Suffolk and Washington, and here in Onondaga County. The settlement of our litigation protecting those defendants’ right to counsel, *Hurrell-Harring v. State of New York*, gave rise to the mandate for the Office of Indigent Legal Services (“ILS”) to create statewide eligibility standards, and plans for ensuring quality and fairness in other aspects of the indigent defense system. Many of the problems that the NYCLU sought to address in the *Hurrell-Harring* litigation still remain in Onondaga County, and issues with unfair and unrealistic eligibility determinations are particularly glaring in this county.

Access to justice and fairness in the process should not depend on the county a defendant is in. Statewide standards for determination of eligibility for counsel are needed to ensure fairness in the process, and prevent wrongful denials of counsel.

I. STATEWIDE STANDARDS ARE NEEDED TO PREVENT WRONGFUL DENIALS OF COUNSEL.

In the vacuum created by the lack of state standards, criminal defendants who cannot afford counsel are denied access to publicly funded attorneys.

The standards imposed by the Assigned Counsel Program in Onondaga County are extremely rigid and unrealistic. Their process does not consider the individual’s overall financial situation; hence, debt payments, regular monthly bills, credit worthiness or job loss as a result of arrest or incarceration are not considered. Eligibility for public assistance is not accepted as presumed evidence of eligibility for assigned counsel; neither is inability to make bail. Moreover, under the Assigned Counsel process, individuals who make monthly mortgage payments on their home, or already own their residence, are automatically disqualified. When individuals try to challenge this automatic denial by stating that they

do not qualify for a home loan, they are often required to show several loan rejections. This is an overly burdensome requirement because it requires three separate applications, each carrying associated non-refundable application fees that may be well beyond the individual's available resources. As a result of these restrictive policies many individuals, who cannot afford a lawyer, are denied representation.

We have also documented examples where the application procedures themselves are vehicles for wrongfully denying counsel to those who cannot afford it. This is particularly a problem for minors in Onondaga County who are estranged from or unable to reach one or both parents. Minors are denied counsel unless both parents fill out the eligibility form. This practice has resulted in the wrongful delays or denial of counsel to many young people. For example, an Onondaga Community College student from a poor family in the western part of the state was denied assigned counsel until the NYCLU intervened because her mother indicated on the eligibility form that she was employed. The town judge made this determination ignoring the fact that her family received food stamps, that there were other minor children in the household, her father was estranged, and her mother was unable to travel from Jamestown or afford a lawyer.

In addition to addressing such documented wrongful denials of counsel, ILS should adopt standards to ensure against other types of wrongful denials commonly observed around the country. A report by the Brennan Center for Justice documented instances of clients denied eligibility because a family member was able to post bond or when the client resided in a state mental health facility.¹ Standards to address these issues are needed whether or not there is an established of faulty decisions on those bases in our state. The purpose of standards is to ensure the integrity of future decisions not merely to address the problems of the past.

II. STATEWIDE STANDARDS ARE NEEDED TO ENSURE FAIR PROCESS.

Eligibility standards must focus not only on who is eligible but also on how determinations are made.

Statewide Standards Must Require a Presumption of Representation and Prompt Decisionmaking.

Too often, the NYCLU has identified defendants who spend days or weeks in jail without meaningful contact with their attorney pending a decision on their financial eligibility. Until it was recently declared unconstitutional, Onondaga County's Assigned Counsel Program (ACP) expressly prohibited defense counsel from undertaking work on behalf of non-incarcerated clients until the program administrator issued a final eligibility determination, a rule that resulted in denial of counsel in critical early stages.² Despite this finding, many defendants in Onondaga County are still not represented at arraignment or informed about the status of their representation. This is because during the first meeting with their attorney, defendants are often instructed only to fill out the eligibility form and there is little or no discussion of their case. Defendants are typically unaware of the whether they have been deemed ineligible for representation until they come to or are brought to court to find that their attorney has filed a motion to be removed or continue representation in the case. Under the Assigned Counsel rules in Onondaga County a lawyer is **required** to submit a motion to be removed from the case if they are unable to get complete financial information from a client or if the Assigned Counsel

¹ Brennan Center for Justice, *Eligible for Justice: Guidelines for Appointing Defense Counsel* (2008) (available at <http://www.brennancenter.org/sites/default/files/legacy/publications/Eligibility.Report.pdf>).

² *Roulan v. County of Onondaga*, 90 A.D.3d 1617, 1621 (4th Dep't 2011), *aff'd in relevant part* 21 N.Y.3d 902 (2013).

office staff determines that their client is financially ineligible. There is no information where this instruction appears in the Assigned Counsel handbook about the lawyer's option to file a motion to continue representation, or when this may be appropriate. To do so is, in essence, to defy the Assigned Counsel rules.

In order to prevent delays in representation, standards should require that all criminal defendants be presumptively deemed eligible, that representation should not be delayed or prejudiced pending a final determination, and that final eligibility determinations be made as soon as practicable.

Statewide Standards Must Ensure Fair, Objective Decisionmaking By a Neutral Magistrate or Independent Agency

In many places, eligibility determinations are tainted by political pressure to keep the costs of public defense down and preserve a market for private attorneys who charge criminal defendants for services. In fact, the director of the Assigned Counsel Program has explicitly stated that it is a goal of the program to limit the amount of people who can qualify for assigned counsel in order to reduce costs to the county. This is particularly concerning in Onondaga County because many judges effectively give automatic deference to the ACP determinations, rather than making an independent determination. Additionally the success the Assigned Counsel Program in limiting the costs of indigent defense services also serves to make it more likely that Onondaga County will continue their contract provide these services. Neither cost savings nor preserving a government contract should take precedence in shaping decisions about provision of constitutionally required indigent defense services.

ILS must promulgate standards that ensure that eligibility determinations are fair, objective, and insulated from these types of political and economic pressures. Written criteria and transparent processes will make a significant difference, but standards explicitly addressing objective processes are necessary.

Standards should require that eligibility determinations be made by an objective, independent person—not the provider of defense services and not the judge presiding over the case. Prosecutors, probation officials, recipients of government contracts and other government actors with financial incentives to reduce costs likewise should be prohibited from involvement in assessing eligibility. Standards should require that determinations be made by a neutral magistrate or by an independent government agency or contractor.

Provide Access to and Notice of the Right to Appeal

An eligibility determination is a determination of a criminal defendant's constitutional rights. Like any other such determination, it must be subject to judicial review. Denials of eligibility should be made in writing, provided in court or by proof of service to the defendant, and accompanied by information about how to appeal that decision.

III. CONCLUSION

We thank ILS for the opportunity to offer testimony today on the importance of statewide eligibility standards. There are also other examples of ongoing problems with the provision of indigent defense services in Onondaga County that should inform ILS' work to implement other components of the *Hurrell-Haring* settlement. We look forward to continuing to work with ILS to ensure that our criminal justice system does not punish poverty and respects the constitutional right to counsel.